No. 15727

In the
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
CALIFORNIA DATE GROWERS ASSOCIATION,
Respondent.

BRIEF IN ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT, CALIFORNIA DATE GROWERS ASSOCIATION

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TABLE OF CASES AND AUTHORITIES CITED

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This is the brief of respondent, California Date Growers Association, filed in answer to the opening brief heretofore filed by petitioner.

JURISDICTION

Respondent raises no issue with respect to petitioner's statements as to jurisdiction, appearing on pages 1 and 2 of its brief.

CORRECTIONS IN PETITIONER'S STATEMENT OF FACTS

The nature of respondent's operations and hiring system, described on pages 2, 3 and 4 of petitioner's brief is accurate. Petitioner has used the heading "Respondent Reduces the Security of Strikers to Punish Them for Striking" on page 4 of its brief. This heading is, of course, purely a legal conclusion and it is not, therefore, a factual statement of the circumstances involved in this case. Respondent admits that it reduced the seniority of some strikers, but it denies that it did so to punish them for striking. Any reduction in seniority that occurred was only incidental to respondent's purpose of keeping its business going at the time the strike occurred.

Although the facts recited under subhead B, page 4, of petitioner's brief are generally correct, petitioner, on page 5 of its brief, refers to the list of March 18, 1954, as a "new seniority list". This list was in fact a Hiring List and it admittedly only included persons who worked during and after the strike. (T.R.[1] p. 247.) Thus, strikers for whom no work was available after the strike, during the 1953-54 season, would obviously not have been included on a list comprising only people who had worked. When hiring began in the 1954-55 season no employee who had gone on strike lost any work or was laid off any sooner because of the March

[1]T. R. references are to the Transcript of Record on file with the United States Circuit Court of Appeals for the Ninth Circuit.

18, 1954 list. (T.R. 258, 292.) Respondent will discuss this situation in more detail in the subsequent portions of this brief as it bears on the Board's conclusion that there was discrimination in violation of Section 8(a) (1) and (3) of the Act. It is sufficient to say at this point that the Board's conclusion is based on an erroneous interpretation of the March 18, 1954 list of employees.

On page 6 of petitioner's brief, it is not correct to state that respondent did not inform any employee about its new seniority policy prior to March 18, 1954. (See T.R. 288.) Furthermore, the record shows that a change in seniority had occurred right after the strike commenced and the Trial Examiner so found. (T.R. 281-283, 286.) The petiioner's statement appears to overlook the fact that it was the March 18, 1954 *and* the 1952-53 seniority list that was used in hiring in the 1954-55 season. (T.R. 291-292.)

On page 10 of petitioner's brief, under subsection 4, petitioner reiterates the conclusion of the Regional Director that 12 employees had not quit. It will be observed that the issue involved is whether the Regional Director acted in an arbitrary and capricious manner in determining that these employees did not quit. This issue will be discussed later in this brief, but it is pointed out here to make it clear to the Court that in the first paragraph under this subtitle 4 petitioner is reciting conclusions rather than facts.

SUMMARY OF ARGUMENT

I. The certification by the National Labor Relations Board is invalid.

A. The Regional Director acted arbitrarily and capriciously in permitting the counting of challenged ballots.

1. The fact that procedural requirements were observed does not excuse arbitrary and capricious substantive findings.
2. Employees who unconditionally applied for reinstatement and thereafter refused to accept work of a nature previously done by them quit their employment.

B. The counting of challenged ballots under the circumstances existing in this case was contrary to the Rules and Regulations of the National Labor Relations Board and was in violation of the Fifth Amendment to the Constitution of the United States.

II. The respondent did not and has not discriminated against its employees with respect to seniority in violation of the National Labor Relations Act, as Amended.

A. The respondent's strike seniority policy was not discriminatory.

B. The March 18, 1954 Hiring List was not discriminatory.

ARGUMENT

I. THE CERTIFICATION BY THE NATIONAL LABOR RELATIONS BOARD WAS INVALID.

A. The Regional Director Acted Arbitrarily and Capriciously in Permitting the Counting of Challenged Ballots.

1. The fact that procedural requirements were observed does not excuse arbitrary and capricious substantive findings.

The Regional Director's determination that 12 employees who refused work in a night shift were entitled to vote was supported by no substantial evidence. Petitioner, in its brief (p. 19) states that there was no affirmative evidence that these employees intended to abandon their employment status. In making this statement petitioner overlooks completely the testimony appearing in the Transcript on page 166. (James F. Wright, General Manager of respondent is testifying in response to questions by John Janosco, representing the Union.):

> "THE WITNESS: In January of 1954, when we put on the night shift—
>
> MR. JANOSCO: That was after the strike.
>
> THE WITNESS: —and we called the people on the seniority list, when they refused to come back to work, we said that they had lost their seniority and they had quit. We did not fire them."

Furthermore, the petitioner completely overlooked the fact that these 12 employees had 'unconditionally" applied for reinstatement after the strike. (See petitioner's brief, p. 9.) Petitioner asserts that none of these employees declined a post strike offer of work on the day shift. This is no argument at all because no day shift work was available. Petitioner also states that some of these 12 employees requested day work at the time they rejected the night work. According to the record, only 3 of the 12 indicated a desire for day work; (Beryl Warren, T.R. 172; Catherine White, T.R. 189; Pauline Skinner, T.R. 196.) This generalization on the part of petitioner emphasizes a basic defect in petitioner's argument. It is not clear from the record, nor can any reasonable inference be drawn therefrom to support petitioner's contention that these 12 employees had not quit. Only 4 of these 12 employees testified.

Petitioner states that the Regional Director had no obligation to call the remainder of the 12 employees. Petitioner further argues that respondent had the burden of producing them as witnesses. This argument is patently unrealistic. Does petitioner mean that respondent has the responsibility of producing *all* the evidence in such a proceeding? Must an employer under these circumstances call his own witness to show that the employees quit, and also locate all those who were formerly his employees and subpoena them to appear as witnesses? Petitioner overlooks completely the fact that a union claims to represent these employees and

one or more union representatives participated in all of these proceedings.

Respondent agrees that it may not have been the duty of the Regional Director to call the remaining 8 employees as witnesses. Yet the Regional Director has a duty to investigate these matters (National Labor Relations Board, Rules and Regulations, Section 102.52) and the most important facts in any such investigation would be to find out from these employees whether they had quit. In view of respondent's consistent contention that the employees had quit, it would certainly appear that such inquiry would be the only reasonable determination of fact for the Regional Director to make. Furthermore, it is not necessary to show that employees subjectively intended to quit.

NLRB v. Scullin Steel Co., 161 F. 2d 143 (C. A. 8);
NLRB v. Waples Platter Co., 140 F. 2d 228 C. A. 5);
Arrow Transportation Co., 109 N.L.R.B. No. 19.

It is not clear from the record whether the Regional Director had anything to do with producing the witnesses who were called. It appears from the record that in the course of his investigation he took the statement of at least one of the 12 employees. (Catherine White, T.R. 189.) It can readily be assumed that because of the Union's interest that the Union assumed the responsibility for the production of witnesses who

would support its contention that the challenged ballots of these 12 employees should be counted. With respect to those who did testify, it is not clear from the testimony of Mayme Ruby (T.R. 182) and Lupe Quijades (T.R. 183) whether they had quit or not.

Petitioner correctly states the rule that an "erroneous" or 'incorrect" administrative decision, or a "mistake of honest judgment" does not constitute arbitrary or capricious action. (Petitioner's brief p. 22.) But a decision which disregards the only substantial evidence, or a decision based on no evidence of a probative nature has long been recognized as arbitrary and capricious.

Baltimore & Ohio Railroad Company v. United States, 264 U.S. 258, 44 S. Ct. 317, 68 L. Ed. 667;

Inland Motor Freight v. United States, 36 F. Supp. 885.

Petitioner argues that the previous practice of the employer in *not discharging* employees who refused night work is evidence that none of these 12 employees quit. This argument completely begs the issue. In the first place, there is no issue of discharge here. The respondent at no time claims to have discharged these 12 employees. Petitioner infers by its argument that the employer, in order to prove that these employees quit, should have discharged them. (Petitioner's brief p. 20.) It is obvious that no such action on the part of an employer is necessary when an employee has quit. The

termination of employment effectively occurs by the act of quitting. No discharge is necessary.

Petitioner discusses at some length the respondent's prior practice of permitting daytime employees to decline night shift work and still remain on the day shift. (Petitioner's brief p. 19.) Petitioner also discusses respondent's prior practice of recruiting a nucleus of its night shift from day shift employees. (Petitioner's brief p. 10.) In attempting to compare the circumstances surrounding the refusal by the 12 employees to accept night shift work on January 16, 1954, with previous night shift operation of the employer, petitioner fails to recognize that entirely different situations are involved. In the first place, these 12 employees unconditionally applied for reinstatement. This clearly means that they were willing to accept whatever employment opportunities were offered to them. In the second place, the previous night shifts referred to by petitioner were filled from day shift employees, but no effort was made to staff the night shift of January 16, 1954, with day shift employees. The employer, in an effort to provide work for as many of the striking employees as possible, offered the first available work on the basis of the 1952-53 seniority list. By refusing to accept this work, these employees thereby quit and were no longer entitled to have their names on the 1953 seniority list. These were not employees who were already working on the day shift and who decided to continue thereon rather than accept night work. Nor

was the situation similar to a day shift employee who may have preferred not to work any longer that season if he couldn't work days. In either of these cases the employees would have retained their position under the 1953 seniority list and there would be no evidence that they had quit.

2. Employees who unconditionally applied for reinstatement and thereafter refused to accept work of a nature previously done by them quit their employment.

The situation here involves 12 employees who, after having unconditionally applied for reinstatement, were presumably awaiting a call to work. When these employees signed the availability sheet after the strike, their availability was not dependent on being called for a day shift rather than a night shift.

Respondent urges, therefore, that these employees quit by refusing to accept employment that was not in any way more onerous than that which they had performed before. According to the record, the respondent's evidence that these 12 employees quit (T.R. p. 166) stands unchallenged as to at least the 8 employees who did not testify. Nor was any evidence offered or presented by the Board or the Union with respect to these 8 employees who did not testify. The action of the Regional Director in finding that these 8 did not quit was, therefore, arbitrary and capricious. The final tally of votes was 82 for the Union and 78 against, so

these 12 votes (or the 8 who did not testify) were sufficient in number to affect the results of the election. For these reasons the election should have been set aside and the certification of the Union by the National Labor Relations Board as the bargaining agent for the employees was invalid.

B. The Counting of Challenged Ballots Under the Circumstances Existing in This Case Was Contrary to the Rules and Regulations of the National Labor Relations Board and Was in Violation of the Fifth Amendment to the Constitution of the United States.

The Regional Director, contrary to the intent of Section 101.18(3) of the Rules and Regulations of the National Labor Relations Board, permitted the counting of the challenged ballots without the respondent or a representative of the respondent being present.

It is quite obvious that respondent could not in good faith claim an inaccuracy in a count of ballots that occurred outside of his presence. To do so would be to make a charge which would merely create suspicion, because the possibility of proof of any alleged fraud or mishandling would be remote at best.

It thus becomes important not only to the Union and the employer, but to the proper functioning of the Board itself that every reasonable effort be made to avoid a situation similar to that which occurred in the instant case. That interested parties should be repre-

sented at the counting of challenged ballots is an easy but extremely important procedure where on the outcome of such elections, such long-range effects on the parties are involved.

Petitioner's brief, pages 12-13, discloses that no real effort was made by the representatives of the Regional Director to determine if anyone representing the respondent was present in the reception room of the Regional Director's office at the time the counting of the challenged ballots was commenced. Although the letters regarding the time set for the counting of the challenged ballots were addressed to counsel for respondent, copies of each letter were sent to the respondent company. It would certainly appear that if the respondent was also being notified of the time for the counting of the ballots that some effort would have been made to ascertain if a representative of respondent, other than its attorney, was present in the reception room of the Regional Director's office at the time the counting of the ballots was commenced.

For these reasons it is respondent's position that the failure of any effective effort to determine whether a representative of the respondent was present at the counting of the challenged ballots is contrary to the intent of Section 101.18(3) of the Board's Rules and Regulations, and further, is arbitrary and capricious and a denial of due process of law guaranteed by the Fifth Amendment to the Constitution.

II. THE RESPONDENT DID NOT AND HAS NOT DISCRIMINATED AGAINST ITS EMPLOYEES WITH RESPECT TO SENIORITY IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED.

A. The Respondent's Strike Seniority Policy Was Not Discriminatory.

Respondent's argument with respect to lawfulness of its strike seniority conforms to the findings and conclusions of the Trial Examiner in his intermediate report. (T.R. p. 34.) Although this statement of the Trial Examiner is included in the record (T.R. pp. 54-63), it is being set forth herein for the convenience of the Court:

> "Not all acts, however, which have the necessary effect of discrimination against those engaged in protected concerted activities, are unlawful under the Act. An economic striker may be permanently replaced and thus lose his job because of having engaged in a strike, and such action while necessarily and emphatically discouraging union activities, is lawful where it is consistent with, and because of the exercise of the employer's 'right to protect and continue his business by supplying places left vacant by strikers.' *Mackay Radio, supra.* Motive controls here because in this situation 'the (employer's) true purpose is the object of investigation with full opportunity to show the facts.' *N.L.R.B. vs. Jones & Laughlin Steel Corp.,* 301 U.S. 1. If the employer has the 'right to pro-

tect and continue his business by supplying places left vacant by strikers,' it would seem to follow that he has also the right to take such other action as he deems necessary 'to protect and continue his business' in the face of an economic strike, providing his motive is, in fact, 'to protect and continue his business,' and not to retaliate against and punish his striking employees. Determining motive in a given situation, frequently requires 'a high degree of introspective perception,'[13] and this is true here where the discriminatory effect of the Respondent's action on seniority is apparent and substantial. There are certain objective factors present, however, which are invaluable in assessing motive.

"Independent of the action with respect to seniority, there is no evidence of anti-union basis on the part of this Respondent. There is no evidence that this Respondent opposed the unionization of its employees, or was in any way hostile to it. Such elections as were held were held pursuant to consent agreements. It is true that negotiation of an agreement to supersede the contract expiring July 1, 1953, reached an impasse and presumably to break that impasse in its favor the Union called a strike, but no refusal to bargain is charged and no inference of antiunion sentiment can rest on this state of facts. It may be assumed that the Respondent did not like it when its employees struck, but when they applied for reinstatement it took them back as fast as it had work for them to perform. With respect to its action in

"[13]*N. L. R. B. vs. Donnelly Garment Company,* 330 U. S. 219, 123. (*sic*)"

reducing the seniority of reinstated strikers, we have the undisputed testimony of its general manager, James F. Wright, that this action was taken for the purpose of reassuring its non-striking employees and replacements concerning the continuity of their employment, and because it considered such action essential to safeguard and protect its economic interests in continuing to operate during the strike.[14]

"If there is something inherently false or specious in this position, I fail to discern it. The strike hit the Respondent when its seasonal operations were at their height since during the Christmas holidays Respondent's products are particularly in demand. It is not in the least incredible that non-striking employees, and employees newly hired

[14]Excerpts from Wright's direct examinations:

"Q. Now, during the period that you were in operation, did you have conversations with the employees either directly or through representatives with respect to the status of the employees who remained and the status of employees who were employed and the status of employees who would come back to work?

"A. Yes. I was in, you might say, constant touch with the employees during this period. In fact, I used to pick them up—quite a few of them and escort them into work every morning, and was in contact not only with the employees who remained during the strike and those who were hired during the strike, and also the ones that returned to work during the strike."

* * *

"Q. What did you do with respect to the (nonstriking and newly hired) employees that I have described here?

"A. Well, as would be natural under a trying situation, the employees would be concerned with their job security, and I assured them at the time that those who had remained through the strike, the replacements and the people who returned, that they would be—had become and would be treated as the nucleus of our work force; that we didn't know how long the strike would go on; that we intended to continue to operate the plant and receive and grade and pack and ship our dates, and that these people we felt were a necessary part of our business; and that I gave them the assurance they would be maintained if and when the strike was terminated."

* * *

Excerpts from Wright's cross-examination:

"Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and

during the strike, would seek some assurance of preferred seniority status which would protect them from displacement by striking employees when and if the latter chose to return to their jobs, or that an employer would give such assurance if he felt it would bolster his economic situation. It is true that the Respondent did not call any of these employees to the witness stand to corroborate the testimony of its general manager, but neither did the General Counsel call any witness to refute it. I observed nothing in the demeanor of the witness which would lead me to discredit him. To the contrary, I was favorably impressed with his forthrightness and his co-operative attitude throughout the hearing.

"There are factors, relied on by the General Counsel in his brief, to counter this testimony.

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wanted personal assurance that they would be taken care of after the strike, you gave it to them?

"A. That's right.

"Q. And that is about all it amounted to?

"A. Well, you say that is about all. It was a pretty important thing for the people.

"Q. It is very important to a girl who had no seniority and was working during the strike and wondered what would happen to her job when seniority employees offered to come back. I understand that. But I want to know whether your publication of your determination to protect these people went any farther than individual assurances.

"A. I believe, Mr. O'Brien, that I talked—well, I know that during the strike I would talk to the working force that was there every day, and this was one of the primary things these people were concerned about, so I am sure they were advised of it in meetings of all the people who were at the plant. As I recall, I met—I had met with the graders and the people in that area of the plant in one meeting, and met with the packers and the people in the pitting department in that area of the plant at another meeting, but that was a daily occasion during the strike.

"Q. That was to encourage them to get out production, let them know you were with them, is that it?

"A. Well, it covered a lot of things.

"Trial Examiner: Mr. Wright, do you have any distinct recollection whether, during any of these meetings that you had with the employees during the strike, whether you specifically mentioned the matter of their security to them? Do you have a recollection of it?

"The Witness: Yes, I do."

The old seniority list, posted in the plant, was not removed, it appears, nor was a new one, conforming to Respondent's revised policy, posted. It is remembered, however, that the old seniority list was not entirely discarded; it was still followed as to the order of reinstating the strikers. The union contract having expired, there was no requirement that the Respondent post its revised list or any list at all. There is also some question as to just when a revised seniority (*sic*) list, dated March 18, 1954, was first prepared, but this does not seem very significant inasmuch as it had little, if any, utility until the beginning of a new season.

"Further, it appears that Wright issued no instructions to Florence Hawkins, Respondent's personnel clerk, at a time when, according to Wright, the new seniority policy was instituted, and at the time strikers were reinstated they were not told that their seniority had been reduced. Presumably, the General Counsel would have it inferred from such factors that the reduction in seniority of reinstated strikers, had not actually been determined at the time the strike was concluded and therefore could not have had as its moving cause the protection and continuance of Respondent's business during the period of the strike. In the face of Wright's positive and uncontested testimony to the contrary, I think such an inference is not justified. With a single exception, there is no showing that strikers on reinstatement inquired concerning seniority status and there is no showing of a deliberate withholding of information; nor was there any advice given them contrary to the

position Respondent now asserts. It may well be that Respondent was not impelled to volunteer information which would be adverse to the reinstated striker's interests, until some occasion arose requiring the application of a new policy.[15] Nor does it appear that the situation was such that once the revised seniority policy had been determined, notice of it would necessarily be channeled immediately to the personnel clerk. It was Wright's undisputed testimony that his supervisory staff was advised concerning the new policy during the period of the strike and the General Counsel apparently accepted this testimony inasmuch as no evidence was offered to refute it. Assuming, however, as apparently the General Counsel would have it found, that no definite formula for a revised seniority policy had been determined until after the strike, such delay would have little significance if, as Wright testified, assurances had been given to nonstrikers, during the strike, concerning the continuity of their employment. It is sufficient that the action, when taken, was consistent with such assurances.

"Upon the evidence afforded me, I can only conclude that the General Counsel has not proved

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[15]Excerpt from Wright's testimony on cross-examination:

"Q. Are you pretty sure that you did not tell any of the returned strikers that they had lost seniority by reason of the fact that some people had continued to work during the strike and they had not?

"A. I didn't personally. One of the problems after a strike when you have people come back, you have the problem of trying to rebuild a coordination between some people who are out and some people that were in, and it isn't too good business policy to agitate that situation at the time they return. You are interested in business continuing.

"Q. Anyway, what it comes down to is this, then: That when some of these people that worked during the strike came to you personally and wanted personal assurance that they would be taken care of after the strike, you gave it to them?

"A. That's right."

unlawful motive in a situation where motive is controlling. I am unable, in fact, to distinguish the situation here from the seniority displacement of economic strikers which the court found lawful in *Potlatch Forests, Inc., supra.* That decision stands squarely for the proposition that an employer may advance the seniority of nonstrikers to the detriment of economic strikers where the action is consistent with, and for the purpose of protecting and continuing his business during the strike. While in the *Potlatch* decision the court refers to those whose seniority was advanced as 'replacements,' it appears that this term as employed by the court included strikers who returned to their jobs before the strike was ended. I do not perceive a valid distinction between such employees and employees who, as here, never went on strike. Neither were actually 'replacements' as that term was employed in the *Mackay Radio* case. Nor do I think the fact that in the *Potlatch* case the employer announced his new seniority policy before the strike was ended, it is a material distinction. In fact, the case at bar is stronger on its facts because in the *Potlatch* case it appears that the employer had given no assurances to his nonstriking employees that 'their places might be permanent,' whereas the uncontested evidence here is that such assurances were given.

"I do not of course undertake to assess the merits or demerits of the *Potlatch* decision. It is the law—at least in the Ninth Circuit. The Board did not seek certiorari and in my opinion it has

not been overruled in any material respect by the Supreme Court in *Radio Officers* and related cases, *supra.* If the Board does not intend to follow the court in *Potlatch,* it is for the Board and not the Trial Examiner to voice its dissent, and until it does so, I consider myself bound by the court's decision.[16] Accordingly it is found that the Respondent did not violate the Act when, for economic reasons, it gave nonstriking employees and replacements seniority over striking employees."

B. The March 18, 1954 Hiring List Was Not Discriminatory.

Throughout the proceedings in this case the petitioner has insisted that the March 18, 1954 Hiring List was a complete seniority list. Respondent respectfully submits that this is not so. The record shows that no discrimination in fact occurred from the use of this list because in the 1953-54 season employees not on the

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"[16]*Mathieson Chemical Corporation, et al.,* 114 N.L.R.B. No. 85, cited by the General Counsel, is distinguishable, because in that decision the Board said:

" 'It is highly significant that not until the strike was over, and all the strikers had been put back to work, did the Respondent for the first time decide to separate its employees into two seniority groups for layoff purposes, depending on whether or not they had returned to work before the end of the strike. The Respondent does not claim and there is no suggestion in the record that, as an economic measure to get employees to work during the strike, it had promised them super-seniority. In fact, it does not appear that the matter of relative seniority was ever mentioned to any employees before the end of the strike.'

"Other cases, cited by the General Counsel, in which labor organizations have been found to have violated the Act by causing the employer to discriminate with respect to seniority, are inapposite for the simple reason that any action by a labor organization which causes an employer to discriminate is unlawful unless covered by the proviso to Section 8(a) (3) of the Act, and discrimination with respect to seniority is not covered by that proviso."

"list" were employed on the basis of the 1952-53 seniority list. (T.R. 291-2.) The Trial Examiner recognized that no discrimination occurred (T.R. p. 65) but he added that the lack of discrimination resulted because of respondent's "caution" rather than because of employer's recognition of a "retained preferential status." Respondent submits that this finding of discrimination based on nomenclature rather than fact is beyond any reasonable interpretation of the National Labor Relations Act. If this were merely a matter of dialectics, it would be idle for the respondent to argue this point. It does, however, have substantial implications in view of the usual wording of the cease and desist orders used by the Board and the Courts in discrimination cases. In other words, if such an order were made, respondent would be required to post an order demanding that it cease and desist doing something that it had not in fact done. The effect on respondent's employee relationships and the publicity resulting from the promulgation in posting of such an order would be patently unfair and a denial of due process of law contrary to the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be set aside and a new and different order be made ordering a new election to be held.

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May 14, 1958.